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To: [CFPB Office of Enforcement\(For External Use Only\)](#); [CFPB Executive Secretary](#)
Cc: [Konop, Benjamin \(CFPB\)](#); [Powell, Lane \(CFPB\)](#); [trey@upstatelawgroup.com](#)
Subject: RESEND Request to Set Aside or Modify CID
Date: Friday, February 15, 2019 2:24:12 PM

Addresses corrected.

From: Candy M. Kern-Fuller, Esq. <candy@upstatelawgroup.com>
Sent: Friday, February 15, 2019 1:49 PM
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Subject: Request to Set Aside or Modify CID

To Whom it May Concern:

Please be advised that the undersigned and her law partner, Howard E. Sutter III, of the firm (Upstate Law Group, LLC) have both received Civil Demands for the provision of oral testimony. Pursuant to the Instructions set forth in the Demands, we petition to set aside these requests based upon the following legal grounds:

1. **The CFPB, as structured, is an unconstitutional entity which, as a result, is prohibited from exercising the enforcement powers it claims – including, but not limited to, the power to compel the undersigned and Mr. Sutter to appear and give testimony as stated in the Civil Investigative Demand**

As the Supreme Court has explained, our Constitution “was adopted to enable the people to govern themselves, through their elected leaders,” and the Constitution “requires that a President chosen by the entire Nation oversee the execution of the laws.” *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 499 (2010). Article II of the Constitution provides quite simply: “The executive Power shall be vested in a President of the United States of America.” U.S. Const. art. II, § 1. And Article II assigns the President alone the authority and responsibility to “take Care that the Laws be faithfully executed.” *Id.* § 3. Article II makes “emphatically clear from start to finish” that the President is “personally responsible for his branch.” Akhil Reed Amar, *America’s Constitution: A Biography* 197 (2005).

In order to control the exercise of executive power and take care that the laws are faithfully executed, the President must be able to supervise and direct those subordinate executive officers. As James Madison stated during the First Congress, “if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.” 1 *Annals of Congress* 463 (Madison) (1789) (Joseph Gales ed., 1834); see also Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 *Ala. L. Rev.* 1205, 1215 (2014) (“The text and structure of Article II provide the President with the power to control subordinates within the executive branch.”).

The Article II chain of command therefore depends on the President's removal power. As James Madison explained during the First Congress: "If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Congress 499 (Madison).

Under the [Consumer Financial Protection Act] as enacted, the President may not supervise, direct, or remove at will the CFPB Director. As a result, a Director appointed by a President may continue to serve in office even if the President later wants to remove the Director based on a policy disagreement, for example. More importantly, a Director may continue to serve as Director under a new President (until the Director's statutory five-year tenure has elapsed), even though the new President might strongly disagree with that Director about policy issues or the overall direction of the agency. Congress insulated the CFPB's Director from Presidential influence, yet also granted the CFPB extraordinarily broad authority to implement and enforce U.S. consumer protection laws.

All of that massive power is ultimately lodged in one person – the Director of the CFPB – who is not supervised, directed, or removable at will by the President. Because the Director acts alone and without Presidential supervision or direction, and because the CFPB wields broad authority over the U.S. economy, the Director enjoys significantly more *unilateral* power than any single member of any other independent agency. By "unilateral power," I mean power that is not checked by the President or by other commissioners or board members. Indeed, other than the President, the Director of the CFPB is the single most powerful official in the entire U.S. Government, at least when measured in terms of unilateral power.

The CFPB's novel single-Director structure departs from history, transgresses the separation of powers, and threatens individual liberty. As such, the CFPB's tenure-protected single-director structure represents an unprecedented trampling on the exercise of electorally accountable executive power, and, therefore, the CFPB should be prohibited from exercising governmental power in its current unconstitutionally structured form.

2. **Even if the CFPB were a Constitutionally formed entity, the CID fails to identify the conduct constituting the alleged "unfair, deceptive or abusive acts or practices in violation of §§1031 and 1036" of the CFPA of 2010.**

An administrative agency's authority to issue subpoenas is a creature of statute. *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colleges & Schs. (ACICS)*, 854 F.3d 683, 690 (D.C. Cir. 2017). Section 5562(c)(2) requires that a civil investigative demand identify both: (1) "the nature of the conduct constituting the alleged violation which is under investigation;" and (2) "the provision of law applicable to such violation." The CID's Notification of Purpose does not delineate how the contracts between individual sellers and individual buyers alleged violate the Consumer Financial Protection Act of 2010 nor how in the "offering or collecting on these products, such persons have engaged in unfair, deceptive or abusive acts or practices in violation of §§1031 and 1036" of the CFPA of 2010.

3. **Even if the CFPB were a Constitutionally formed entity and its Notification of Purpose were adequate, the CID should be modified to protect the undersigned's and Mr. Sutter's ethical duties to maintain their client's attorney-client privileges and the undersigned's and Mr. Sutter's attorney work product privileges.**

The Bureau is aware that the undersigned and Mr. Sutter have represented and do represent other individuals who the Bureau has already sought oral testimony from. The Bureau is aware that the undersigned and Mr. Sutter are attorneys and that they are required under the Rules of Professional Conduct to maintain the confidences of their clients and their work product on behalf of their clients. The undersigned and Mr. Sutter believe that much of the specific information that may be solicited would be covered by these privileges and that, as such, the CID should be modified to protect such privileges.

As such, the undersigned on her own behalf and on behalf of Mr. Sutter request that the CID's issued to both of them be set aside or modified.

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